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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Conservatorship of the Person of CHRISTOPHER A.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY,  Petitioner and Respondent,  v.  CHRISTOPHER A.,  Objector and Appellant.	D055186   (Super. Ct. No. MH98397)
In re CHRISTOPHER A. on Habeas Corpus.	D055831

APPEAL from an order of the Superior Court of San Diego County and a petition for writ of habeas corpus, Frederick Maguire and William H. Kronberger Jr., Judges.  
  
Order affirmed; petition denied.

## INTRODUCTION

Christopher A. appeals an order reappointing a conservator of the person for him under the Lanterman-Petris-Short Act (LPS Act). (Welf. & Inst. Code, § 5000 et seq.) Christopher contends the court violated his due process rights by mistakenly treating his waiver of a jury trial on the issue of whether he is gravely disabled to also be a waiver of a court trial on this issue and consent to reestablishment of the conservatorship. In addition, he contends there is insufficient evidence to support the court's decision to take away his right to make medical treatment decisions relating to his mental disorder.

In a companion petition for writ of habeas corpus, Christopher contends his trial counsel provided ineffective assistance by approving the form of an order that inaccurately memorialized his waiver and by failing to challenge the court's acceptance of the order after discovering the order was inaccurate. We affirm the order and deny the petition.

## BACKGROUND

On January 7, 2009<sup>1</sup> the San Diego Health and Human Services Agency (Agency) through its Office of Public Conservator (Public Conservator) filed a petition under the LPS Act for the reestablishment of a conservatorship of the person for Christopher. The petition alleged Christopher has a mental disorder, he continues to be "unable to provide for [his] basic personal needs for food, clothing, or shelter" and he "is unwilling to accept or incapable of accepting treatment voluntarily." The petition sought Christopher's

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<sup>1</sup> All of the subsequent lower court proceedings also occurred in 2009.

continued placement in a locked facility and the imposition of certain disabilities, including the loss of the right to make medical treatment decisions related to his mental disorder.

A hearing on the petition was set for February 5 in the department of the superior court assigned to handle mental health matters (mental health department). A few days before the hearing date, Christopher's counsel filed a demand for a jury trial, which included a waiver of the hearing on the petition. The trial date was set for March 2 in a trial department.

On the trial date, while the trial court was addressing preliminary matters with counsel, Christopher repeatedly waved his hand to get the trial court's attention. When the court acknowledged him, he informed the court that he was "not really interested in following through with the court hearing." Instead, he stated he "wanted to accept conservatorship for at l[e]ast another six months to a year," but wanted to go to a board and care facility rather than a locked facility. He had expressed a similar desire a month earlier in a voice mail message to Dr. Matthew Carroll, a forensic psychiatrist who examined him to determine whether he was gravely disabled.

The trial court explained to Christopher that he had a right to a jury trial on the issue of whether he was gravely disabled and that the question of placement would be decided by another judge. The trial court further explained to Christopher that it could not guarantee any particular placement.

The Agency's counsel then proposed that, if Christopher waived a jury trial and consented to the conservatorship, the trial court enter an order transferring the case back

to the mental health department for a subsequent hearing on placement and disabilities. Christopher confirmed he understood the proposed process and stated, "I'm willing to agree to that."

Christopher's counsel, Christopher Olsen, objected to Christopher waiving his right to a jury trial. Olsen explained that Christopher had expressed his desire to go through with a conservatorship trial many times, including as recently as during the noon recess. Olsen further explained that Christopher was nervous and intimidated by the process, and, in Olsen's view, Christopher lacked the capacity to waive his jury trial rights because he was currently a conservatee. The trial court was not persuaded by Olsen's lack of capacity argument because the LPS Act specifically confers on people in Christopher's position the right to waive a jury trial and none of the findings made as part of Christopher's current conservatorship precluded him from making a waiver decision.<sup>2</sup>

The Agency's counsel informed the trial court the situation was not unique as Christopher had demanded a jury trial in connection with his current conservatorship and had changed his mind on the day of trial. The prior trial judge questioned Christopher to ensure he did, in fact, want to waive his jury trial rights and then transferred the case back to the mental health department. Olsen confirmed this history, but added that Christopher immediately regretted the decision and has since consistently expressed a desire for a jury trial, which is why Olsen could not support the waiver.<sup>3</sup>

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<sup>2</sup> The trial court was correct on this point. (*Conservatorship of Moore* (1986) 185 Cal.App.3d 718, 732 [conservatees are not automatically considered incompetent].)

After conducting an unreported chambers conference to clarify the next steps and determine what questions it should ask, the trial court resumed proceedings and engaged in an extensive colloquy with Christopher. First, the trial court queried Christopher to ensure Christopher was not under the influence of alcohol or drugs and knew who he was, where he was, and why he was there. Next, the court explained to Christopher once again that he had a right to have a jury decide whether he was gravely disabled and described specifically what the right entailed. The court asked Christopher if he understood the right and its components and he indicated he did.

The court then asked Christopher, "Do you understand that if you waive your right to a jury trial on [the gravely disabled] question, the balance of these proceedings o[n] the reestablishment of a conservatorship will be returned to [the mental health department]." Christopher initially stated he did not understand; however, after conferring with Olsen, he stated he did.

The court continued, "Do you understand that in that department there will be a determination relative to appointment of a conservator and reestablishment of a conservatorship?" Christopher responded, "Yes, your honor." The court then queried whether Christopher understood the implications of having a conservator and who the conservator would be. Christopher indicated he did.

Next the court asked, "Do you understand you have the right to oppose these proceedings, including the denial of any right, level of placement, and the decision as to

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<sup>3</sup> Olsen also stated his supervising attorney had not authorized him to agree to a jury trial waiver.

who is to be your conservator?" Christopher indicated he did. The court then asked Christopher whether he wanted to waive his right to a jury trial because he was "under some sort of duress or fear?" He replied, "No, I'm not, your honor." Finally, the court asked him if he was giving up his right to jury trial on the issue of whether he was gravely disabled and he responded that he was and that he was doing so freely and voluntarily. Based on this colloquy, the court found Christopher had waived his jury trial right and ordered the matter returned to the mental health department.

Olsen reaffirmed his objection to the waiver. He also requested the record reflect Christopher "is not admitting he is gravely disabled, but that he's just waiving the right to the jury trial." The court responded, "Least that be unclear on the record, there is no admission whatsoever by [Christopher] as to his status, capabilities or anything at all. He is simply saying: I simply don't want a jury trial. I want to move forward to the question of level of placement, care, decision making, and deal with it in that fashion. Is that a fair statement, sir?" To which Christopher replied, "Yes, sir."

Afterwards, the Agency's counsel prepared and, on March 10, the trial court signed an order memorializing Christopher's waiver and the trial court's decision. The order stated that, after being advised of his rights as a proposed conservatee and the procedure for challenging a conservatorship under the LPS Act, Christopher stated he wished "to extend the conservatorship for another year and waive his right to a jury trial on the issue of 'grave disability.' " The order then directed that the jury trial be taken off calendar and the matter remanded to the mental health department "to schedule a further

hearing to set the placement and disabilities of the conservatee." Olsen approved the order as to form.

In May, the mental health department conducted a hearing to determine Christopher's placement and disabilities. At the commencement of the hearing, the Agency's counsel informed the court, "Just to tidy up, your Honor, the last document in the file is an order from March 2nd or 10th, and it basically provides that the issues for the court to decide today are placement and disabilities for [Christopher]." Olsen did not object to this characterization of the order or the outstanding issues before the court.

Dr. Matthew Carroll, a forensic psychiatrist, testified at the hearing that Christopher, who was then 33 years old, has had bipolar disorder since he was 16 years old. Dr. Carroll last examined Christopher the morning of the hearing and, in his opinion, Christopher continued to be gravely disabled. Christopher's predominant symptoms were mania, disorganization, and delusions. He was currently at a closed, locked facility and had recently begun having problems maintaining his personal hygiene. In addition, in March, he was let out on a pass and used marijuana, which causes distinct problems in a person on his medication regimen. Around the same time, he requested extra caffeine and he was found with extra coffee. Dr. Carroll explained that coffee is considered contraband at the facility because caffeine can cause problems for people suffering from mental illness.

Dr. Carroll further testified that since 2005, Christopher had been hospitalized nine times and had been in 15 board and care facilities. None of the board and care placements lasted long, either because Christopher did not comply with his medication

regimen or because of other issues, such as marijuana usage. In 2008, Christopher was arrested for stealing, decompensated significantly and had to be hospitalized.

Dr. Carroll believed Christopher was not capable of operating a vehicle, entering into contracts, or possessing a firearm. He believed Christopher was capable of completing a voter registration form and of making medical treatment decisions unrelated to his mental disorder. However, he did not believe Christopher was capable of making medical treatment decisions related to his mental disorder. Dr. Carroll based this opinion on Christopher's poor insight, his history of not complying with his medication regimen, and his questionable commitment to taking his medications as reflected in recent incidents of him "cheeking" medications, using marijuana, and requesting caffeine to make him feel better. Dr. Carroll further believed the least restrictive level of placement for Christopher was in a closed, locked facility. He did not believe a board and care facility would be a safe placement given Christopher's poor history with this type of placement and the 2008 incident in which Christopher did not take his medications, was arrested, decompensated, and required hospitalization. Dr. Carroll believed a similar course of events would occur if Christopher was placed in a board and care facility because of the monitoring level at such facilities.

Olsen attempted to cross-examine Dr. Carroll on the issue of whether Christopher was gravely disabled. Dr. Carroll explained generally how he evaluates someone to determine whether they are gravely disabled; however, he stated he did not evaluate Christopher for grave disability when he examined Christopher that morning because he



thought the only issues before the court were placement and disabilities. Then, the following exchange took place:

"[OLSEN]: Just for the record, I don't know if the court or anyone else is aware of this, but there actually has not been a ruling on whether or not [Christopher] is gravely disabled.

"[AGENCY'S COUNSEL]: I think there is an order in the file, your Honor. The court can read that.

"[OLSEN]: The order does not state that there was a finding of gravely disabled or there was conservatorship or — it just states that it — that the matter should be transferred back to this court for further proceedings, consistent with what happened in the trial court.

"[AGENCY'S COUNSEL]: I don't —

"THE COURT: The order says that, upon his appearance before the court, [Christopher] stated he did not wish to proceed with trial. The court advised him of the rights of the proposed conservatee and the procedure for challenging conservatorship under the LPS Act. Therefore, [Christopher] reiterated his wish to extend the conservatorship for another year and waived his right to a jury trial on the issue of grave disability. So what am I missing?" [¶] . . . [¶]

"[OLSEN]: This was a history of what happened, but I think we had language in there that we struck out that it was to reestablish the conservatorship. And that understanding was that we were coming back here without prejudice or rights to change the conservatorship."

"THE COURT: Look at paragraph three. Doesn't [the trial court] answer the question when [it] says, 'the purpose of which is to schedule a further hearing to set placement and disabilities of the conservatee'?"

"[OLSEN]: Okay.

"THE COURT: So it appears to me that that issue is behind us.

"[OLSEN]: All right. That being said, I'll go back to the examination."

Later in the hearing, the court asked Christopher if he understood why he was there. Christopher testified, "For a judgment consistent on if I stay on conservatorship or get placed into a board and care or stay still stuck in the hospital, I guess. The only two reasons why I should know why I'm here."

The court also asked him where he wanted to live and he replied he wanted to live at a board and care facility in Vista, where he had lived once before. He told the court that, while at the facility, he was able to see a doctor weekly, he took essentially the same medications, and he planned to continue taking these medications. He also told the court that he planned to follow the facility's rules.

At the conclusion of the hearing, the court reappointed the Public Conservator as the conservator of the person for Christopher and ordered Christopher placed in a closed, locked facility. The court also imposed several disabilities on Christopher, including the inability to make medical treatment decisions related to his mental disorder.

## DISCUSSION

### I

#### A

On appeal, Christopher contends the trial court's March 10 order taking the jury trial off calendar and remanding the matter back to the mental health department for further proceedings is invalid because the order does not accurately reflect the scope of his waiver, which was only of his right to a jury trial on the gravely disabled issue and not of his right to a court trial on the issue. Our comparison of the order with the transcript of the March 2 proceedings reveals no substantive discrepancies.

The transcript shows that in the midst of a discussion of pretrial matters, Christopher intentionally sought the trial court's attention so he could inform the court, against his trial counsel's wishes, that he did not want to go forward with "this court hearing" and that he wanted to "accept conservatorship for at l[e]ast another six months to a year." The trial court then carefully and thoroughly explained to Christopher his jury trial rights and what the next steps would be procedurally if he chose to give up those rights. After listening to the trial court's advisements and confirming his understanding of them, Christopher waived his jury trial rights. He also acknowledged there would be no further contested proceedings on the gravely disabled issue and that the matter would be transferred back to the mental health department for the reestablishment of the conservatorship, the determination of who would be the conservator, and the determination of his placement and disabilities. The trial court's March 10 order corresponds with the transcript on each of these points.

Although Christopher did not admit he was gravely disabled during the March 2 proceedings, he identifies no legal authority requiring him to make such an admission before he can validly waive a trial on the issue. To the contrary, the LPS Act allows him to acquiesce to the reestablishment of a conservatorship, which is effectively what he did. (Prob. Code, § 1825, subd. (a)(3); *Conservatorship of Tian L.* (2007) 149 Cal.App.4th 1022, 1029-1031; *Conservatorship of Pollock* (1989) 208 Cal.App.3d 1406, 1411; *Conservatorship of Moore, supra*, 185 Cal.App.3d 718, 723, 729-731; see also Super. Ct. San Diego County, Local Rules, rule 8.2.33, Re-establishment of Conservatorship — Consent to Re-establishment.)

The trial court's remarks about returning the matter to the mental health department for "reestablishment of a conservatorship" do not aid Christopher's position. Considered in their context, these remarks merely reflect that, procedurally, the mental health department rather than the trial court would issue the actual order reestablishing the conservatorship. They do not show, particularly given Christopher's acknowledgements to the contrary, that Christopher contemplated a bench trial on the gravely disabled issue once the matter was returned to the mental health department.

Moreover, if Christopher desired and contemplated a bench trial on the gravely disabled issue, we question why this would not have occurred while the matter was still assigned to the trial department. At the point Christopher informed the trial court of his wishes, the trial court had finished ruling on the parties' in limine motions and was about to begin jury voir dire. Had Christopher desired only to waive a jury trial and proceed with a bench trial, the trial court could have released the prospective jurors and conducted

the bench trial without further delay. The fact this did not happen supports our conclusion the March 10 order accurately reflects what occurred during the March 2 proceedings.

## B

We also reject Christopher's contention that, upon learning of the discrepancies between the March 10 order and Christopher's counsel's version of events, the mental health department was required by due process principles and Probate Code section 1828<sup>4</sup> to consult with him and inform him of the nature of the waivers in the order, the

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<sup>4</sup> Prior to the establishment of a conservatorship of the person, Probate Code section 1828, subdivision (a), requires a court to inform the proposed conservatee of :

"(1) The nature and purpose of the proceeding.

"(2) The establishment of a conservatorship is a legal adjudication of the conservatee's inability properly to provide for the conservatee's personal needs or to manage the conservatee's own financial resources, or both, depending on the allegations made and the determinations requested in the petition, and the effect of such an adjudication on the conservatee's basic rights.

"(3) The proposed conservatee may be disqualified from voting if not capable of completing an affidavit of voter registration.

"(4) The identity of the proposed conservator.

"(5) The nature and effect on the conservatee's basic rights of any order requested under Chapter 4 (commencing with Section 1870), and in the case of an allegedly developmentally disabled adult, the specific effects of each limitation requested in such order.

"(6) The proposed conservatee has the right to oppose the proceeding, to have the matter of the establishment of the conservatorship tried by jury, to be represented by legal counsel if the proposed conservatee so chooses, and to have legal counsel appointed by the court if unable to retain legal counsel."

Probate Code section 1828, subdivision (b), further requires the court to consult with the proposed conservatee to determine the proposed conservatee's opinion concerning:

"(1) The establishment of a conservatorship.

"(2) The appointment of the proposed conservator."

Probate Code section 1828 applies to LPS Act conservatorships. (Welf. & Inst.

consequences of the order, and whether he knowingly and willingly consented to the order. Christopher cites to no authority allowing, much less requiring, one court to presume and proceed as if another court's order is inaccurate and invalid merely because one party's recollection of events differs from what is reflected in the order. Absent such authority, we cannot fault the mental health department for giving credence to the trial court's order.

Our prior decision in *Conservatorship of Christopher A.* (2006) 139 Cal.App.4th 604 (*Christopher A.*) does not alter our conclusion. In that case, we held the court violated Christopher's due process rights in a prior LPS Act conservatorship proceeding by accepting a stipulated judgment on the issues of placement, disabilities, and powers of the conservator without either a court hearing on these issues or an indication Christopher consented to the judgment. (*Christopher A.*, at pp. 612-613.) Although Christopher's attorney approved the stipulated judgment, we concluded this approval was not a sufficiently sound constitutional safeguard against error because an attorney may not enter an agreement impairing a client's substantial rights without the client's consent. (*Ibid.*)

In this case, it was Christopher, not his counsel, who asked to end the trial on the gravely disabled issue and proceed with a court hearing on placement and disability issues. While his trial counsel approved the March 10 order as to form, his trial counsel's actions cannot be construed as waiving any of Christopher's substantive rights since the

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Code, § 5350.) The trial court's advisements to Christopher during the process of taking his jury trial waiver complied with the requirements of Probate Code section 1828. (*Conservatorship of Ivey* (1986) 186 Cal.App.3d 1559, 1567.)

order ultimately reflects the trial court's decision, not his trial counsel's. Accordingly, the constitutional concern we identified in *Christopher A.* is not present here.

### C

In his companion petition for writ of habeas corpus, Christopher contends his trial counsel provided ineffective assistance by approving the form of the March 10 order and by failing to challenge the mental health department's acceptance of the order. In support of the petition, he submitted a declaration stating that he only waived his right to a jury trial on the gravely disabled issue and he still wanted a court hearing to determine whether he was gravely disabled and whether the conservatorship should be reestablished. In addition, he states he never changed his mind about wanting the hearing and never agreed to extend the conservatorship without a hearing. He also states he never saw the March 10 order and he never authorized his trial counsel to approve its form.

Given the direct conflict between the statements in Christopher's declaration and the transcript of the March 2 proceedings, Christopher's petition raises factual issues regarding his state of mind during March 2 proceedings and his credibility. We decline to consider such issues for the first time on appeal. (*Conservatorship of Deirdre B.* (2010) 180 Cal.App.4th 1306, 1317.) Further, as we observed in *Dierdre B.*, presentation of factual issues for the first time in an appellate forum is not an expeditious means of protecting a conservatee's interests. (*Ibid.*) Instead, counsel should immediately bring such issues "to the trial court's attention by filing a rehearing or habeas petition and obtain a ruling on that petition." (*Ibid.*; see also Super. Ct. San Diego County, Local Rules, rules 8.2.21-8.2.24, Rehearing, and rules 8.8.1-8.8.4, Writ of Habeas Corpus.)

## II

Lastly, Christopher contends there is insufficient evidence to support the mental health department's finding that he is unable to make medical treatment decisions relating to his mental disorder. We review this finding for substantial evidence.

*(Conservatorship of Amanda B. (2007) 149 Cal.App.4th 342, 347.)*

The evidence shows Christopher has poor insight into his mental disorder and a lengthy history of failing to comply with his medication regimen. In addition, the evidence shows he has a questionable commitment to future compliance with his medication regimen as, just a few months prior to the hearing to determine his placement and disabilities, he had used marijuana and was found with extra coffee, both of which are particularly harmful to him. There had also been recent incidents of him "cheeking" his medication. We conclude this evidence amply supports the finding he is unable to make medical treatment decisions related to his mental disorder.

### DISPOSITION

The order is affirmed. The petition for writ of habeas corpus is denied.

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McCONNELL, P. J.

WE CONCUR:

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HALLER, J.

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AARON, J.